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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 886

MARVIN DANCYGER,
Petitioner,

vs.

STATE OF NEW JERSEY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

Petitioner, Marvin Dancyger, prays that a writ of certiorari issue to review the mandate of reversal of the Supreme Court of New Jersey made and entered February 2nd, 1959 in the action entitled "*State of New Jersey* vs. *Marvin Dancyger*", reversing the judgment of the Superior Court, Appellate Division of the State of New Jersey, which reversed the conviction of petitioner in the Essex County Court on the second count of a certain indictment which originally charged three counts, namely, stealing a diamond ring valued at Two Thousand Seven Hundred Fifty ($2,750.00) Dollars.

As mentioned hereinabove, the petitioner was originally indicted in an indictment charging three counts, the first count being the crime of entering a certain room with intent to steal in violation of N. J. S. 2A:94-1; the second count charging the stealing of a diamond ring in violation of N. J. S. 2A:119-2; the third count charging stealing another ring in the value of Five Hundred ($500.00) Dollars in violation of N. J. S. 2A:119-2. The said indictment is set forth in full in Appendix D.

The jury could not agree on the first count, and the third count was withdrawn by the prosecutor.

Opinions Below.

This case was tried in the criminal division of the Essex County Court of the State of New Jersey before the Honorable Gerald T. Foley and a jury. No opinion was rendered in that Court. Upon the conviction of the petitioner on the second count of the said indictment, an appeal was taken by the petitioner to the Superior Court of the Appellate Division which reversed the conviction.

The opinion of that Court was officially reported in 51 N. J. Super. 150 (1958) and is printed as Appendix B hereto. Thereafter the State of New Jersey appealed to the Supreme Court of New Jersey which reversed the judgment of the said Appellate Division and reinstated the trial court's judgment of a conviction of larceny and affirmed the same. The opinion of the said Supreme Court is printed in Appendix A hereto and is officially reported in 29 N. J. 76.

Jurisdiction.

The judgment of the Supreme Court of New Jersey termed "Mandate on Reversal" was entered February 2nd, 1959. (See Appendix C.)

The jurisdiction of this Court is invoked under 28 U. S. C. 1257, Sec. 3.

Questions Presented.

1. Was the petitioner herein afforded a fair trial within the purview of the fourteenth amendment of the United States Constitution, Subdivision I thereof, where the petitioner did not take the stand at the trial and the Judge, in part, charged the jury that petitioner's failure to testify as to certain facts which tended to prove his guilt raised a strong presumption that petitioner cannot truthfully deny these facts? In other words was the charge such that the petitioner's privileges and immunities were violated and he was denied due process of law?

2. May the prosecutor in summation tell the jury that if a defendant does not take the stand to testify and deny certain facts within his knowledge there is a strong presumption that such defendant did not take the stand because he could not deny those facts?

Statutes Involved.

The statutory provisions of the State of New Jersey are involved herein as follows:

N. J. S. 2A:119-2.

"Any person who:

(a) Steals any money, goods, chattels or other personal property of another, or * * *

(b) * * *, carries away or unlawfully appropriates, with intent to steal, any real or personal property of another, or any part thereof, or * * *"

N. J. S. 59A:18-71 N. J. L. 386.

"Is guilty of a misdemeanor, if the price or value of such property be under $50.00, and if the price or value thereof be $50.00, or over, such person is guilty of a high misdemeanor."

Statement of the Case.

The petitioner herein was a traveling salesman employed by Charles S. Loeb Company of New York City (P19a-30-40).* Petitioner's job frequently took him to certain parts of New Jersey such as Newark and East Orange (Exh. S-3, S-4, S-5 and S-6, P161a, 163a, 165a, 167a).

One, Mrs. Estelle Grossbardt, spent the summer of 1956 as a guest of Goldman's Hotel, an establishment located

* "Pa" refers to the record abstract printed as the respondent's appendix in the said Supreme Court of the State of New Jersey, which appendix was used on appeal by the respondent herein to said Supreme Court of New Jersey.

in West Orange, New Jersey (P8a-11-15; P14a-9-16). With her were her children and a governess; her husband visited her on weekends (P8a-23-24; P14a-9-10; P8a-23-24; P17a-9-12).

Mrs. Grossbardt had a quantity of jewelry which she took with her on vacation. Among these items were a diamond ring and a certain bracelet (P8a-38; P9a-20). The jewelry was left in her room which was never locked except when she was asleep and was placed in a box which was unlocked (P9a-21-22; P14a-5-7; P18a-12-30).

On the evening of July 29th, 1956, on a Sunday, Mrs. Grossbardt wore the platinum ring and bracelet (P9a-27-40). When she returned to her room on Monday morning, July 30th, 1956, she placed the jewelry in the unlocked box on the dresser of her room (P10a-23-30). On July 31st, 1956, a Tuesday, at about 7:00 p. m. thereof, Mrs. Grossbardt ascertained that the platinum ring and bracelet were not in the box (P11a-5-20).

On July 30th, 1956 the bracelet was pawned at a certain pawn shop at 1937 Broadway, New York City, at a time estimated to be between 3:30 p. m and 4:30 p. m. (P65a-14-21; P82a-29-32; P95a-10-24). In regard to this the prosecution called a handwriting expert who testified that he compared the handwriting on the pawn ticket with samples of petitioner's handwriting and that they were the same. The name on the said pawn ticket was "Max Doreshaw" (P103a-7-8; Exh. S-8). Also called by the prosecutor were two witnesses, namely Morris White and Ray White, who were the owners of a jewelry store at No. 257 Main Street, Poughkeepsie, New York. They disclosed that on July 31st, 1956 between 12:00 noon and 1:00 p. m. the petitioner

entered their store and showed them the platinum ring in question telling them that he found the ring (P51a-3-12; P51a-12-24). These witnesses reported this to the police in Poughkeepsie and when the police interrogated the petitioner he told them that he found the ring in the gutter (P59a-8-11; P59a-11-12; P59a-12-15).

Also called by the prosecution was the proprietor of the hotel and an employee. The proprietor, Maclyn Goldman, testified that when the alleged theft occurred, he was called by the authorities. He never identified the petitioner herein at trial; he did identify a picture of the petitioner, such picture being a police photograph; thus when testifying, this witness stated that the person in the police photograph was a person he had seen a week or two prior to July 30th, 1956 (P35a-22; P37a-23-25; P36a-34-40; P37a-10-12; P42a-7-35; Exh. S-7).

A Mr. Fine, an employee of the hotel, testified that he had seen the petitioner at the establishment during the summer of 1956; that he did not exactly know the month, but that he had seen the petitioner on a single occasion, a Saturday night, between July 15th and July 30th, 1956 (P86a-38a-34-35).

The petitioner did not take the stand nor testify; following the presentation of the prosecution's case the petitioner's wife testified that petitioner during the months of June and July, 1956 spent Saturday evenings with her and their children (P134a; 135a-8-17).

In summation, the prosecutor in part stated as follows, and the following also occurred;

> "Now the defendant did not take the stand. And I, as a representative of the State of New Jersey,

want to be most fair. And I recognize it is not the duty of the defendant to take the stand. He has the right not to. But, ladies and gentlemen, Mr. Fine testified that he saw him at the hotel prior to July 30th.

Mr. Kaplan: Your Honor.

The Court: Yes.

Mr. Kaplan: At this time I am going to object. I anticipate what Mr. Sarcone is going to say, and before it gets across to the jury I think I should object at this time.

The Court: Upon what ground?

(204) Mr. Kaplan: I am fully aware of the law of the State of New Jersey, the fact that the prosecutor can comment. However, your Honor, I feel that is only done where the defendant is placed at the scene of the crime on the particular date or within a particular period of time, and there is no such testimony in this case at all, your Honor.

The Court: I don't know of any such rule, Mr. Kaplan. The law, as laid down most recently in the case of State *v.* Costa, 11 N. J. 239, at page 244, was this:

> 'Where facts concerning act of defendant are testified to which tend to prove his guilt and he, by his oath, can deny them, his failure to testify in his own behalf raises a strong presumption that he cannot truthfully deny those facts'." (P147a-5-30).

The Court: You may proceed.

Mr. Sarcone: The Court may charge you as to what the law affords when a defendant does not take the stand. As I understand it, if there is anything testified to at the trial that the defendant can of his own knowledge deny, if he does not take the stand, there is a strong presumption that he did not take the stand because he could not deny.

Now my recollection is that Mr. Fine stated that the defendant——

Mr. Kaplan: Your Honor, so far as that goes, I think I must object too. I think that is a matter for the Court to instruct the jury.

The Court: Well, of course I shall instruct the jury and I shall tell the jury that they are bound to take the law from the judge, not from counsel. But I think it is proper for counsel to state his understanding of the law as a preface to his argument.

You may continue, Mr. Sarcone.

(206) Mr. Sarcone: Here Mr. Fine has stated under oath that he saw the defendant at the hotel. The defendant did not take the stand and say, 'I wasn't at the hotel then,' or, 'I was never at the hotel.' I then ask you to consider the Court's charge on that point." (P148a-10-33).

In its charge to the jury, the Court in part instructed as follows:

"The defendant did not take the stand himself. Well, in that connection, I will charge you as follows: The defendant is at all times presumed to be innocent and the burden of proving his innocence is not upon him. He is not required to show he is innocent, and I charge you that it is the privilege of the defendant to testify or not, as he chooses. You are not at liberty to infer guilt from his failure to give evidence. However, where facts concerning the acts of the defendant are testified to which tend to prove his guilt and he, by his oath, can deny them, his failure to testify in his own behalf raises a strong presumption that he cannot truthfully deny those facts.

The criterion is whether there are facts in evidence concerning the acts or conduct of the defendant, within his personal knowledge, which are incul-

pative or imputative in some degree of guilt, which fact he, by his oath, can deny." (P156a-35-40; P157a-5).

About an hour after the jury retired, they returned to the Court (P158a-10-20). The jury then handed the judge a note which states as follows:

> "Would like to see portion of judge's charge concerning non-calling of defendant to stand." (P158a-10-20).

The judge in response again gave the jury the same instructions as to the petitioner's choice of not taking the stand (P158a-20-40).

Of the remaining two counts of the indictment, the jury returned a verdict of guilty as to the second count charging the larceny and failed to agree as to the first count charging the entry with intent to steal (P159a-30-40).

Reasons for Granting the Writ.

A. The use by the prosecutor of the petitioner's previous assertion of his constitutional privilege against self-incrimination.

The charge to the jury in regard to the petitioner's choice not to testify and the comment by the prosecutor in regard thereto came within the interdiction of the fourteenth amendment, subdivision I, of the United States Constitution.

In the immediate case and its attendant circumstance that the jury returned to the Court after one hour of deliberation and asked for the instructions formerly given in

regard to the petitioner's choice not to testify, it is submitted that a weighty question as to the fairness of the trial is presented in the constitutional sense.

A fair reading of the record warrants a conclusion that what may have convinced the jury was not an objective view of the evidence, but the petitioner's availing himself of the privilege against self-incrimination.

This is not the case where within possible limitations the court and prosecutor can comment on a defendant's criminal action refusal to testify. This does involve an attitude on the part of a court to tell the jury that there is a presumption of guilt that may flow from resort to the privilege against self-incrimination. This very court in *Adamson* vs. *California*, October, 1956 Term, 332 U. S. 46; 67 S. Ct. 1672; 91 L. Ed. 1903, considered the limits in which the state and prosecutor may venture in this regard. There the appellant was convicted in a California court of murder of the first degree. Endemic, to California criminal procedure where statutes allow comment by court and prosecutor and to be considered by court and jury as to failure of a defendant in a criminal case to testify, and also permitted the prosecutor to question the defendant if he took the stand in his behalf after prior convictions. The appellant there did not take the stand to testify because of his prior criminal record and the aforementioned rule allowing comment on this failure was invoked against the appellant. In disposing of the appellant's contention that the privilege against self-incrimination as provided for in the Fifth Amendment of the United States Constitution was not a privilege and immunity within the Fourteenth Amendment to the United States Constitution and the State's procedure

was not violative of the due process clause, this court limited its holding as is shown on pages 55-56 of 332 U. S., as follows:

> "Generally comment on the failure of the accused is forbidden in our jurisdiction. This arises from state constitutional or statutory provisions similar in character to the federal provisions. Fifth Amendment and 28 U. S. C., Section 632. California, however, is one of the few states that permit limited comment upon a defendant's failure to testify. That permission is narrow. The California law * * * authorizes comment by the court and counsel upon the 'failure of the defendant to explain or to deny by his testimony in evidence or facts in the case against him'. This does not involve any presumption rebuttable or irrebutfable either of guilt or of truth of any fact that is offered in evidence. Compare Tot *vs.* United States, 319 U. S. 463, 470 * * *"

Then on page 58 it was further held:

> "Failure of the accused to testify is not an admission of the truth of the adverse evidence. Instructions told the jury that the burden of proof remained upon the state and the presumption of innocence with the accused. Comment on failure to deny proven facts does not in California tend to supply any missing element of proof * * * It only diverts attention to the strength of the evidence for the prosecution as to the weakness of that for the defense. The Supreme Court of California called attention to the fact that the prosecutor's argument approached the border line in a statement that might have been construed as asserting 'that the jury should infer guilt solely from the defendant's silence'. That court felt it was improbable. The

jury was misled into such an understanding of their power. We shall not interfere with such a conclusion * * *"

In *Adamson*, then the holding limited the right of a state trial court and prosecutor in this regard. That case sustained the validity of the procedure adopted because the state court was restricted to comment on the defendant's failure to testify. As a matter of fact, this court pointed out that the trial court in California limited the right of a prosecution to argue that a jury may infer guilt from the defendant's failure to testify. In this case the limit was exceeded by both the trial court and the prosecutor because the jury was explicitly told that when facts were reduced which tended to prove petitioner's guilt, his failure to testify in his own behalf raised a strong presumption that he could not deny those facts. That instruction deprived the petitioner of the presumption of innocence and shifted prosecution's burden of proof to petitioner. The "borderline" eluded to in *Adamson* vs. *California, supra*, on page 58 of 332 U. S. 46, was exceeded in this case.

That this "presumption" had a marked effect on the jury could be seen by the return of the jury during their deliberation to see the portion of the trial court's charge as to petitioner's choice not to testify.

The opinion of the highest court in New Jersey, namely The Supreme Court which entertain the ultimate appeal in the State, stated that the testimony that the petitioner was in the hotel prior to the alleged theft considered that the testimony as to petitioner's alleged handwriting on the pawn ticket warranted the charge to the jury.

It is submitted that if a presumption of guilt is allowed to flow from these facts solely because petitioner did not testify, then the petitioner was convicted unfairly. As a matter of fact, the highest court in New Jersey expressly stated that the trial court was warranted in charging the presumption because the defendant did not deny that he was in the hotel and that he did pawn certain items. This clearly demonstrates that the procedure that was violated at the trial in *Adamson* vs. *California, supra*, and approved by this court, was not followed in New Jersey.

If the State of New Jersey afforded the petitioner a presumption of innocence and could concomitantly impose a burden of proof on the prosecution, then a further constitutional defect appears by virtue of the charge to the jury. Put another way, can a state take away a privilege or a right because a person avails himself of the privilege of self-incrimination? Recently this very court held that the right of public employment and the retention of an official position could not be interfered with solely because a person in such position availed himself of the privilege against self-incrimination. We commend to this court *Slochower* vs. *Board of Higher Education of New York City*, October Term 1955, 350 U. S. 551; 76 S. Ct. 637; 100 L. Ed. 692; Modified 351 U. S. 944; 76 S. Ct. 637; 100 L. Ed. 1470. This recently decided case held that a state violated "due process" by the summary dismissal from public employment of a person who invoked the privilege against self-incrimination and refused to testify before a congressional committee. The state therefore contended that there were two inferences flowing from the assertion of the privilege (a) answering would tend to prove Slochower guilty

of a crime committed with his official conduct, or (b) to avoid answering falsely invoked the privilege that the answer would incriminate him thereby stating a falsehood. Thereby on page 557 of 350 U. S. it was held:

> "At the outset we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment. The right of an accused person to refuse to testify which had been in England merely a rule of evidence was so important to our forefathers that they raised it to the dignity of a constitutional enactment and it has been recognized as 'one of the most valuable prerogative of a citizen.' 'Brown *vs.* Walker, 161 U. S. 591, 610'. 'We have reaffirmed our faith in this principle recently in Quinn *vs.* United States, 349 U. S. 155. In Ullmann *vs.* United States, 350 U. S. 422, decided last month, we scored the assumption that those who claim this privilege are either criminals or perjurers. The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury.' "

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Rose Rothenberg,
Attorney for Petitioner.

APPENDIX A.

Opinion of Supreme Court.

SUPREME COURT OF NEW JERSEY

A-65 SEPTEMBER TERM 1958

STATE OF NEW JERSEY,
Plaintiff-Appellant,

vs.

MARVIN DANCYGER,
Defendant-Respondent.

Argued Decided

MR. V. SEELEY ROMAINE argued the cause for Plaintiff-Appellant. (MR. CHARLES V. WEBB, JR., Essex County Prosecutor, Attorney; MR. MYRON W. KRONISCH and MR. V. SEELEY ROMAINE on the Brief.)

MR. SAMUEL ALLCORN, JR., argued the cause for Defendant-Respondent.

The opinion of the court was delivered by

PROCTOR, *J.*

The defendant was tried in the Essex County Court upon an indictment charging him with (1) wilfully entering the room of Estelle Grossbardt with intent to steal in violation of N. J. S. A. 2A:94-1, and (2) stealing her platinum diamond ring valued at $2,750 in violation of N. J. S. A. 2A:119-2. The jury was unable to reach a verdict on the first count and as to that count a mistrial was declared.

The jury rendered a verdict of guilty on the second count and judgment was entered thereon. On defendant's appeal the Appellate Division reversed the conviction, one judge dissenting. 51 N. J. Super. 150 (1958). The State appeals from that judgment. *N. J. Const.* Art. 6, §5, par. 1; R. R. 1:2-1(b).

The State proved at the trial that Mrs. Estelle Grossbardt, accompanied by her two children, ten and two years of age, and a governess, spent the summer of 1956 at the Goldman Hotel in West Orange, New Jersey. Her husband joined them on weekends. Mrs. Grossbardt, her children and her husband occupied the same room while the governess occupied a separate room. Mrs. Grossbardt's room was located on the ground floor of the hotel. Access to the room was off a central corridor which in one direction led to the main lobby at the front of the hotel, and in the other direction to a side entrance door opening into the parking lot and in the rear of the corridor to a door opening into the swimming pool area. Because it was necessary to provide her children with access to the room the door was always left unlocked except when Mrs. Grossbardt retired for the night. She kept her jewelry in an unlocked jewel box on the top of the dresser in her room.

On Sunday evening, July 29, 1956, Mrs. Grossbardt attended a social function at the hotel and wore some of her jewelry, including the ring mentioned in the indictment and a gold charm bracelet. She returned to her room sometime after midnight, placed the jewelry in her jewel box and retired. The following day, July 30th, Mrs. Grossbardt left the room at about 9:00 A.M., and her husband remained there until about 11:00 A.M. when he returned to the city, leaving the room unlocked. Mrs. Grossbardt had no further occasion to open her jewel box until 7:00 P.M. on Tuesday, July 31st. At that time she discovered that her diamond ring, her charm bracelet and other articles of her jewelry were missing. She immediately notified

the proprietors of the hotel and they in turn notified the West Orange police. The police made an investigation the same evening and sent out a teletype message containing a description of the missing jewelry. The missing charm bracelet was pawned at the Lincoln Square Pawn Brokers in New York City on Monday, July 30, 1956, between 3:30 P.M. and 4:30 P.M. The pawn broker's slip showed that the bracelet was pawned for $50.00 in the name of "Max Doreshorne." The State's handwriting expert identified the handwriting on the pawn slip as that of the defendant. His opinion was based upon a comparison of admittedly genuine signatures of the defendant with the handwriting on the pawn slip.

The defendant was employed from November 1955 up to the time of the trial as a salesman by a New York City company engaged in the wholesaling of pipes and smokers' articles. His duties were to call on retailers and solicit orders. On July 30, 1956, the date of the alleged theft, the defendant had taken orders from three customers in Newark and one in East Orange. The Goldman Hotel is within a half-hour's driving distance from the shops of the customers. There was no proof as to the time or times of day when these orders were taken.

On Tuesday, July 31, 1956, at about 1:00 P.M., the defendant called at a jewelry store in Poughkeepsie, New York, owned by Morris White and his wife Rae. He showed Mrs. White a platinum diamond ring and told her that he found it in the street in Poughkeepsie and asked whether the stone was "glass or is it a diamond?" Mrs. White took the ring to the back of the store and handed it to her husband. Mr. White became suspicious and instructed her to call the police. The defendant told the police officers that he was a salesman and had been calling on his customers in Poughkeepsie; that he had found the ring that morning in the gutter of the street in that city and had taken it to White's jewelry store to determine whether it

was of any value. The ring was retained by the police and later identified by Mrs. Grossbardt. This is the ring mentioned in the indictment.

Maclyn Goldman, one of the proprietors of the hotel, testified that shortly after the theft he identified a person in a photograph shown him by the police as a man who had been at the hotel on several occasions prior to the date of the alleged theft. It was stipulated that the person in this photograph was the defendant. While Goldman was unable to conclude with certainty after looking at the defendant in the courtroom that the defendant had visited the hotel, he was definite in his statement that he had seen the person in the photograph at the hotel. He testified on cross examination:

> "I cannot say that Mr. Dancyger was the man there, but I do say that the person on the photograph that was shown to me was definitely there on several occasions before, as I have heretofore stated.
>
> Q. And since you got the picture you have looked at Mr. Dancyger? A. I have looked at him several times.
>
> Q. And you are not certain? A. I am not certain he is the man that I saw, but he bears a very strong resemblance to the man I saw."

Herbert Fine, the hotel's social director, testified to having seen defendant in the hotel lobby sometime after 8:00 P.M. on a Saturday evening between July 15 and July 30, 1956. On weekends during the summer months there were often as many as 600 to 650 guests at the hotel and between 150 and 170 employees.

At the conclusion of the State's case the defendant moved to dismiss both counts of the indictment. The court denied the motions ruling that "while the case is purely circumstantial, a *prima facie* case has been established on both counts."

The defendant did not take the stand. The only witness called on his behalf was his wife. She testified that during the months of June and July 1956 the defendant spent every Saturday evening with her and had never spent a Saturday evening during this period at the Goldman Hotel. Upon the completion of her testimony, the defendant rested and moved for a judgment of acquittal, which motion was denied. The court charged the jury that the case was one founded in circumstantial evidence and instructed them that they could return a verdict of guilty or not guilty on both counts, or guilty on one and not guilty on the other. In concluding the court stated:

> "I may say in connection with the latter part of what I have just stated to you—I say this purely by way of comment, which you are not required to accept if you think it is inappropriate—it does seem that under the facts of this case the verdict should be either guilty on both counts or not guilty on both counts."

As mentioned above the jury could not agree on the first count (entering with intent to steal) and as to this count a mistrial was declared. The jury returned a verdict of guilty on the second count (larceny).

The defendant's motion for a new trial was denied and from the judgment of conviction the defendant appealed to the Appellate Division of the Superior Court. The defendant urged the following grounds for reversal: (1) The evidence does not support the larceny charge and therefore the motions for judgment of acquittal should have been granted; (2) the trial court's charge with respect to defendant's failure to testify was erroneous; (3) he was prejudiced by the improper admission of evidence and the improper remarks of jeweler White who testified for the State; and (4) the verdict was inconsistent and a compromise verdict.

The majority of the Appellate Division reversed the judgment of conviction and held that the proofs "did not exclude a reasonable hypothesis of innocence of the theft charge, so that the trial court should have granted defendant's motions for acquittal." Because of this disposition of the case the majority deemed it unnecessary to discuss the other points raised by the defendant. On its appeal to this court the State contends that the evidence presented was sufficient for the jury to find beyond a reasonable doubt that the defendant was guilty of larceny.

The evidence presented by the State was wholly circumstantial. However, if this evidence is of sufficient quality to convince a jury beyond a reasonable doubt of the defendant's guilt it does not matter that it is circumstantial. *State* v. *Donahue*, 2 N. J. 381, 389 (1949). It has often been said that circumstantial evidence is not only sufficient but may also be "more certain, satisfying and persuasive than direct evidence." *State* v. *O'Connor*, 134 N. J. L. 536, 539 (Sup. Ct. 1946). Therefore, the question before the trial court at the close of the State's case was whether the evidence, viewed in its entirety and giving the State the benefit of all legitimate inferences therefrom, was such that the jury could properly find beyond a reasonable doubt that the defendant had stolen Mrs. Grossbardt's ring. See *State* v. *Goodman*, 9 N. J. 569, 581 (1952); *State* v. *Rogers*, 21 N. J. 218, 232 (1955). The evidence at the close of the State's case permitted the jury to conclude that the ring had been stolen. The disappearance of property from the place where the owner put and kept it, and without the owner's knowledge and consent, is evidence of theft. 32 *Am. Jur., Larceny*, §136, p. 147. The jury could have also concluded that the larcenous taking occurred sometime after 11:00 A.M. on Monday, July 30th and that the defendant pawned under an assumed name the charm bracelet, a part of the stolen jewelry, in New York City

between 3:30 P.M. and 4:30 P.M. on the same day. The proofs further showed that the defendant was in possession of the stolen ring the following day in Poughkeepsie, New York. From this evidence the jury was entitled to find that the defendant was in exclusive possession of the stolen jewelry soon after it was taken.

It is well established that the unexplained and exclusive possession of stolen property shortly after the theft justified an inference that the possessor is the thief. 1 *Wharton, Criminal Evidence,* § 135, p. 254 (12th ed. 1955); 3 *Underhill, Criminal Evidence,* § 601 (5th ed. 1957); 9 *Wigmore, Evidence,* § 2513, p. 417 (3d ed. 1940 and 1957 Supp.). See *State* v. *Lax,* 71 N. J. L. 386, 387 (Sup. Ct. 1904); *State* v. *Dunlap,* 103 N. J. L. 209 (Sup. Ct. 1927). The basis for such an inference is the improbability that the accused could have acquired the stolen property so soon after the theft unless he was the thief. Therefore, the shorter the period of time between the theft and possession the stronger this inference becomes. *Boehm* v. *United States,* 271 Fed. 454 (2d Cir. 1921); *Note,* 46 *Col. L. Rev.,* 460 (1946). The inference (that the possessor is the thief) is incompatible with any hypothesis of innocence of the crime charged and if the State produces facts justifying such an inference the issue must be submitted to the jury as that body may consider the inference to be the equivalent of direct evidence that the accused committed the theft. *Note, Presumption of Larceny from the Unexplained Possession of Stolen Goods,* 23 Va. L. Rev. 616 (1937). Cf. *State* v. *Donahue, supra,* pp. 390-391. Even in those few jurisdictions where such possession standing alone is not sufficient to sustain a conviction only slight corroborative evidence of other inculpatory circumstances is required. For example, the sale of stolen property under an assumed name has been held a circumstance which in addition to possession is sufficient. *People* v. *Lang,* 142 Cal. 482, 76

Pac. 232 (1904); *McCutcheon* v. *State*, 140 Tex. Cr. 74, 143 S. W. 2d 611 (Cr. App. 1940).

In the present case the State's proofs showed that the defendant was present at the Goldman Hotel one or two weeks prior to the disappearance of the jewelry; that the defendant was in the vicinity on the day of the theft; and that the defendant pawned the stolen bracelet in New York City under an assumed name within a few hours after the theft in West Orange. No explanation was offered on behalf of the defendant as to the manner in which he came into possession of the charm bracelet which had been stolen along with the ring. Possession of part of the stolen property indicates the theft of the whole where the evidence shows that all of the property was taken at the same time and place. *Bridc* v. *State*, 86 Tex. Cr. 535, 218 S. W. 762 (1920). The jury could have concluded that the failure of the defendant to explain his possession of the charm bracelet to anyone at anytime made implausible the defendant's explanation to the police in Poughkeepsie that he found the ring in that city.

In our opinion the above proofs clearly made the question of whether the defendant was guilty of larceny one for the determination of the jury and it was for them, rather than for the court, to decide whether the evidence was such as to satisfy them of defendant's guilt beyond a reasonable doubt. We think there was ample evidence, although circumstantial, from which the jury could find that the defendant was guilty of the crime charged.

The majority of the Appellate Division were of the opinion that the State's evidence did not destroy the "probable explanation" that the defendant was a "fence" rather than the actual thief. We cannot agree. In order to justify such an explanation it would be necessary to find somewhere in the chain of circumstantial evidence a fact or facts from which an inference could reasonably be drawn that

the theft was committed by a person other than the defendant. There was no such evidence in the case and therefore the trial judge would not have been justified in concluding that there was a rational hypothesis that the defendant was a "fence" or receiver of stolen property. Cf. *State* v. *Shelbrick*, 33 N. J. Super. 7 (App. Div. 1954). N. J. S. A. 2A:139-1 provides that possession of stolen property within one year of the theft, if unaccounted for, shall be deemed sufficient evidence to justify a conviction of receiving stolen goods. The rebuttable presumption of guilt of receiving stolen goods, implicit in the statute, is for the benefit of the State where an indictment alleges that offense. Cf. *State* v. *Giordano*, 121 N. J. L. 469 (Sup. Ct. 1939). This statute has no application in a prosecution for larceny. Moreover, the trial judge in ruling on the motions for acquittal, and the jury in their consideration of the evidence, together with the legitimate inferences to be drawn therefrom, could have deemed it unlikely that a "fence" would exhibit his illicit wares to an established jewelry store for appraisal or attempt to dispose of them at a pawn shop; and that such conduct would be more characteristic of a thief anxious to dispose of his loot.

Having concluded that the trial court properly denied defendant's motions for acquittal, it is necessary for us to consider the additional grounds of error alleged by the defendant and not considered by the Appellate Division because of the contrary result which they reached on the initial question. The first of these alleged errors relates to the court's charge. As mentioned above the defendant did not take the stand. The court charged the jury as follows:

> "The defendant is at all times presumed to be innocent and the burden of proving his innocence is not upon him. He is not required to show he is innocent, and I charge you that it is the privilege of the

defendant to testify or not, as he chooses. You are not at liberty to infer guilt from his failure to give evidence. However, where facts concerning the acts of the defendant are testified to which tend to prove his guilt and he by his oath can deny them, his failure to testify in his own behalf raises a strong presumption that he cannot truthfully deny those facts.

"The criterion is whether there are facts in evidence concerning the acts or conduct of the defendant, within his personal knowledge, which are inculpative or imputative in some degree of guilt, which fact he, by his oath, can deny."

At the conclusion of the charge, counsel for the defendant stated: "I take exception, for the record, to that portion of your charge wherein the defendant fails to take the stand." After the jury had retired, they sent a note to the trial judge requesting that portion of his charge relating to the "non-calling of the defendant to the stand." In response the court repeated that part of the charge quoted above.

Defendant contends that the present case was not a proper one in which to make any comment whatsoever on the defendant's failure to take the stand; that if given it should have been limited to inculpatory facts; and that the charge should have contained an explanation that the presumption is one that is permissive only.

This court has recently engaged in a comprehensive review of the problems involved in the formulation of an adequate charge in cases in which the accused fails to testify. *State* v. *Corby,* 28 N. J. 106 (1958). In discussing the nature of cases in which such a charge may be appropriate, Justice Francis stated:

"The cases demonstrate that the rule is applicable when there is direct evidence of facts showing

defendant's participation in the crime, or *where there is direct evidence of facts circumstantially implicating him.* * * * However, it has been said that where the inculpatory facts are purely circumstantial, comment on an accused's silence is improper. * * * It is difficult to envision a case where the proof adduced by the State would be sufficiently incriminating to require the issue of guilt or innocence to be sent to the jury for determination and yet would not contain some facts which he could deny of his personal knowledge. * * * From an academic standpoint it may be sound to say that if the evidence is so wholly circumstantial as to admit only of a general denial of guilt by the defendant, the adverse implication should not be drawn. But as a practical matter, such a case is more supposititious than real, and care must be exercised so as not to deny the State the advantage of the charge where in justice it may be given." Id. at 118-19. (Emphasis added.)

In the present case there was testimony that the defendant was present at Goldman's Hotel prior to the date of the alleged theft. While in and of itself this fact does not directly implicate the defendant in the crime charged, when considered in conjunction with the other evidence before the jury, there are inculpatory inferences which the jury reasonably could draw. Also, and more significant, there was before the jury the unimpeached testimony of the handwriting expert. This evidence established the inculpatory facts that the defendant was in possession of the stolen jewelry within a few hours after its disappearance and that he pawned part of it under an assumed name. Whether or not the defendant signed the pawn slip and pawned the charm bracelet were facts within his personal knowledge which he could have disproved by his own oath as a witness if they were not true. *State* v. *Costa*, 11 N. J.

239, 253 (1953). The defendant's failure to deny the above facts circumstantially implicating him in the theft warranted the court in commenting on his failure to testify.

Defendant argues that it was error not to inform the jury that the presumption was merely a permissive inference which they might draw. However, the defendant's objection was a general attack on that portion of the charge dealing with his failure to testify. The objection related to the propriety in this case of charging anything at all on the subject, and in nowise suggested criticism of that part of the charge relating to "a strong presumption." Hence, the defendant can only prevail if that part of the charge qualifies as plain error. R. R. 1:5-1(a). In *State* v. *Corby*, *supra*, we held that a charge similar to that quoted above did not constitute plain error. Our views expressed in that case are applicable here and we find from our examination of the record no such manifest injustice as would warrant a reversal of the conviction.

During the direct examination of the State's witness Maclyn Goldman, he was asked if he had ever seen the defendant before. He responded: "I don't know. I recall a picture was exhibited to me." The prosecution moved to strike everything after, "I don't know," but defendant objected and the answer was allowed to stand. The witness then testified that he had been shown a photograph—stipulated to be that of the defendant—and had identified the person in the photograph as having been at his hotel prior to the date of the theft. The State offered the photograph in evidence and it was received over the defendant's objection. All writing on the photograph was obliterated. The court cautioned the jury that it was to be considered "solely for the purpose of substantiating the testimony of Mr. Goldman, if in fact you find it does substantiate his testimony," and that no inferences were to be drawn from the fact that the photograph was in the possession of the

police or that the writing thereon was obliterated. Defendant asserts that the introduction of the photograph was for the purpose of neutralizing the witness' testimony when he was unable to identify the defendant at the trial, and that as such the court should have informed the jury of the limited purpose for which such evidence is accepted. See *State* v. *Kusilka*, 85 N. J. L. 712, 714 (E. & A. 1913). We do not believe that the admission of the photograph must be so limited. It is clear that the State had no desire to neutralize the testimony of the witness but merely intended to have him identify the man in the photograph while under oath. The defendant did not object to the testimony and made no request to the court that it be limited in any manner. It was stipulated that the man was the defendant. A witness may testify to a person's identity from a photograph. 2 *Wigmore, Evidence*, § 660 (3rd ed. 1940). The photograph thus had definite probative force on the issue of identity. Cf. *State* v. *O'Leary*, 25 N. J. 104, 115 (1957). It is conceivable that the witness could identify the man in the photograph and not the defendant in the courtroom. At the time of the trial more than fifteen months had elapsed since the defendant was allegedly seen by the witness at the hotel. Defendant's appearance in the observation of the witness may have changed during this period. In any case, the weight to be given to this identification is peculiarly the function of the jury. It was the defendant who objected to the striking of the witness' testimony which opened up the subject of the photograph. We see no error in its admission or in the court's refusal to limit its purpose to neutralization of this witness' testimony.

While laying the foundation for the subsequent testimony of the handwriting expert, the State asked James Roberts, a detective with the West Orange police department, where he obtained certain specimens of the defendant's handwriting:

"Q. Did you turn anything over to Mr. Haring (the hand writing analyst) other than the documents that have been marked for identification? A. Yes, two photographic prints of three fingerprint cards bearing the signature of Marvin Dancyger.

"Q. Where did you receive these from? A. New York City Police Department, the B. C. I."

Defendant raised no objection at the trial. However, counsel now asserts as plain error that the jury received the impression that the defendant had a criminal record and was thus prejudiced. The defendant was a resident of New York. There are any number of reasons other than the conviction of a crime why the police may come into possession of a person's fingerprints. The cards were relevant for the purpose of an expert comparison of defendant's signatures thereon with the writing on the pawn slip. They were later admitted without objection, defendant's counsel stipulating that they contained the defendant's signatures. The jury was expressly told by the court that the exhibit could not be used for any purpose other than the admitted signature of the defendant. In view of the above, the reference to their origin was not plain error requiring a reversal.

Morris White, the Poughkeepsie jeweler, was called as a witness for the State. As he was leaving the witness stand he noticed that the ring, which he had just identified, had been left either on a table or railing in the courtroom. He gratuitously remarked: "They better take away the ring before it will be missing again." The trial judge did not hear the actual words spoken, but did admonish the witness that he was present only to answer questions and told him he could stay in the courtroom only if he behaved himself. The purport of White's remark is not clear. Perhaps he intended it as a jocular admonition against leaving a valuable ring in a public place. There was no objection

or motion for a mistrial and we do not find that defendant was prejudiced by the remark.

Finally, it is contended that the jury's verdict of guilty on the larceny count is inconsistent with its failure to reach a verdict on the entering with intent to steal count. Defendant alleges that this demonstrates that the result achieved by the jury was a compromise verdict and requires reversal. We cannot agree with this interpretation of the jury's verdict. They were expressly informed that they could find the defendant guilty or not guilty on one or both of the counts submitted to them. We need not decide whether in the circumstances of the present case a verdict of guilty on one count and not guilty on the other would be inconsistent, for the jury failed to return any verdict on one count. There is, therefore, nothing with which the guilty verdict may be inconsistent. Each count of the indictment related to a different substantive offense, each offense involving independent elements which the jury had to conclude existed before a verdict of guilty might be rendered. The failure to return a verdict of guilty on the entering with intent to steal count is evidence only that one or more members of the jury could not conclude beyond a reasonable doubt that the State had prov d all elements of that offense. The determination of guilt of the larceny is not repugnant to the inability of the jury to agree as to the other charge. *State* v. *Janiec*, 20 N. J. Super. 471, 481 (App. Div. 1952). As we have already concluded that there was ample evidence to support the guilty verdict on the larceny count, there is no basis for concluding that the verdict represents a compromise. A verdict cannot be upset by speculation on such a matter. *Dunn* v. *United States*, 284 U. S. 390, 52 Sup. Ct. 189, 76 L. Ed. 356 (1932).

For the reasons set forth above, the judgment of the Appellate Division is reversed and the trial court's judgment of conviction of larceny is reinstated and affirmed.

APPENDIX B.

Majority Opinion of Appellate Division.

Argued May 19, 1958—Decided July 3, 1958.

Before JUDGES GOLDMANN, FREUND and CONFORD.

MR. SAMUEL ALLCORN, JR., argued the cause for appellant (MESSRS. GOODELL and ALLCORN, attorneys).

MR. MYRON W. KRONISH, Legal Assistant Prosecutor, agued the cause for respondent (MR. CHARLES W. WEBB, JR., Essex County Prosecutor, attorney).

The opinion of the court was delivered by GOLDMANN, *S. J. A. D.*

Defendant appeals from a County Court judgment entered upon a jury verdict, sentencing him to a term of three to five years in State Prison for larceny of a ring.

On October 8, 1956 the Essex County grand jury returned an indictment in three counts charging that on July 30, 1956 defendant (1) wilfully entered the room of one Estelle Grossbardt with intent to steal, in violation of N. J. S. 2A:94-1; (2) stole a platinum diamond ring belonging to her valued at $2,750, and (3) stole another of her rings, worth $500, both in violation of N. J. S. 2A:119-2. At the outset of the trial the court granted the prosecution's motion to sever the third count, and the cause thereafter proceeded on the first two counts—entering with intent to steal, and larceny of the platinum diamond ring.

The evidence disclosed that the complaining witness, Mrs. Estelle Grossbardt, was a guest at Goldman's Hotel, a resort hotel in West Orange, New Jersey, during the 1956 summer vacation period. She was accompanied by her two children, aged ten and two, and their "governess," a girl of 17 or 18. Mr. Grossbardt joined his family on weekends. During her stay at the hotel Mrs. Grossbardt and her chil-

dren—and her husband on weekends—all occupied the same room, while the "governess" occupied a separate room. The Grossbardt room was located on the ground floor of the hotel. Access to the room was off a central corridor which led in one direction to the main lobby at the front of the hotel and in the other direction to a side door opening onto the parking lot and also to a door in the rear leading to the swimming pool area.

Mrs. Grossbardt had brought with her a quantity of her personal jewelry, consisting of a platinum diamond ring, charm bracelet, cultured pearls, wrist watch and other items. She kept this jewelry in an unlocked jewel box on top of her dresser. The door of her room was never locked except when she was inside asleep.

Mrs. Grossbardt testified that on Sunday evening, July 29, she wore some of her jewelry, including the platinum diamond ring and the charm bracelet. When she returned to her room in the early hours of Monday, July 30, she placed this jewelry in the unlocked box on the dresser and went to sleep. At about 11 A. M., after Mr. Grossbardt had departed for the city, the room was left empty and unlocked. Mrs. Grossbardt did not look into her jewel box again until 7 o'clock the next evening, Tuesday, when she discovered that all her jewelry was missing.

It was proved that the charm bracelet was pawned at a pawnshop in New York City on Monday, July 30, between 3:30 and 4:30 P. M. The State's handwriting expert, comparing the name signed on the pawn ticket "Max Doreshorne," with samples of defendant's handwriting, testified that in his opinion they all were written by one and the same person. The clerk who actually handled the pawn transaction was not called as a witness by the State, although he was still employed at the pawnshop and his name and address were known to the police. Instead, the assistant manager testified as to the fact and time of the pawn.

The evidence further showed that on Tuesday, July 31, between noon and 1 P. M., defendant entered a jewelry store in Poughkeepsie, New York, owned by Morris and Rae White, showed Mrs. White a platinum diamond ring he said he had found lying in the street, and asked whether the stone was glass or diamond. She took the ring to her husband at the rear of the store and he, being suspicious, instructed her to call the police. They soon arrived and requested defendant to accompany them to police headquarters where, in response to their questioning, he informed them he was employed as a salesman by a pipe and tobacco company and had been making calls on his customers in Poughkeepsie that morning, and that as he crossed the street he saw a shining object in the gutter, picked it up and took it into the jewelry store to see if it had any value. Mrs. Grossbardt identified this ring, as well as the charm bracelet, as her property.

As defendant had told the police, he was a salesman for a New York City company engaged in the importing and wholesaleing of pipes and smokers' articles. The State introduced order slips showing that on Monday, July 30, defendant had taken orders from four different customers, three located in Newark and one in East Orange, New Jersey. The prosecution offered no proof, however, of the time of day when the respective orders were taken or the means of transportation then being used by defendant.

Accepting as true the testimony of Mrs. Grossbardt that her hotel room was not empty until 11 A. M. Monday, and the fact that her charm bracelet was pawned between 3:30 and 4:30 P. M. that same afternoon, the obvious conclusion is that her jewelry must have been taken between those hours and transported to New York City. The only evidence placing defendant at the scene of the crime was the testimony of Maclyn Goldman, one of the owners of the

hotel, and Herbert Fine, who described himself as in charge of athletic and social programs there.

Goldman's testimony essentially was that the person appearing in a photograph which had been shown him by the police prior to the trial—it was stipulated that this was a police photograph of defendant—had been a dinner guest at the hotel a week or two before July 30, 1956. However, when he looked at defendant in the courtroom he was not so sure of his identification; he said that defendant resembled someone he had seen at the hotel, but whether defendant himself had been there he did not know. When the trial resumed in the afternoon the witness was again shown defendant's police picture, and he then testified that he had seen the man in the picture in and about the hotel within a week or two of the date in question. On cross examination he stated that he could not say the person in the photograph was the man he had seen at the hotel. He said that defendant bore a very strong resemblance to the man he had seen, but when asked directly, "Is he or is he not the man," he replied, "I can't answer that question, sir." The rest of Goldman's testimony concerned the number of guests at the hotel on a summer weekend, 500 to 600; the fact that there were 150 to 170 employees on the weekend of the robbery, 30 to 40% of them "new faces"; that there were three exits out of the hotel from Mrs. Grossbardt's room, and the windows in her room could be opened from the inside.

Fine testified that he had seen defendant in the lobby of the hotel during the summer of 1956 but when asked to give the month he replied he could not. The State's attorney then said he had no further questions, but when defense counsel moved to strike Fine's testimony as being too remote in time and not connected, he resumed direct examination. Upon further probing by rather leading questions, to which no objection was entered, the time the witness said he saw defendant in the hotel lobby was narrowed to a Sat-

urday night between July 15 and July 30. He could not recall just what Saturday night it was, but it was after 8 P. M. He remembered the time, so he explained, because at that hour everyone not a guest at the hotel would be asked to leave preparatory to the evening show in the hotel's night club. Fine remembered seeing defendant wandering alone through the main lobby, but he could not recall how he was dressed and he did not tell him to leave. Although the general practice was to question a person who was not a guest, Fine did not stop or question defendant on that particular evening.

At the close of the State's case defendant moved to dismiss both counts of the indictment because of the State's failure to make out a *prima facie* case. The motion was denied. Defendant did not take the stand; his wife was his only witness. She testified that she worked in New York City and defendant had picked her up at her place of employment every Saturday evening during the summer of 1956 and then spend the entire evening with her. Upon the completion of her testimony defendant again, unsuccessfully, moved for a judgment of acquittal. The court then charged the jury, stating that the case was one founded in circumstantial evidence and directing that it could return a verdict of guilty or not guilty on both counts, or guilty on one and not on the other. In concluding he made the comment, which he said the jury was not required to accept, that it seemed to him that under the facts of the case "the verdict should be either guilty on both counts or not guilty on both counts."

The jury could not agree on the first count (entering with intent to steal), and a mistrial was declared as to it. It returned a verdict of guilty on the second count (larceny). Defendant moved for a new trial because the verdict was contrary to the weight of the evidence and the court erred in not granting his motions for acquittal; the verdict

was inconsistent and a compromise verdict; there was trial error in the admission of the police photograph and a police fingerprint chart, and there were errors in the charge. The motion was denied.

On appeal defendant claims that (1) the evidence does not support the larceny charge and the motions for judgment of acquittal should therefore have been granted; (2) the trial court's charge with respect to defendant's failure to testify was erroneous; (3) he was prejudiced by the improper admission of evidence and the improper remarks of jeweler White, who testified for the State; and (4) the verdict was inconsistent and a compromise verdict. After the completion of the oral argument we requested both sides to file supplemental briefs covering the following points:

(1) On the hypothesis that defendant had an arrangement with someone in Goldman's Hotel to steal jewelry (not necessarily the jewelry in this case) and then turn it over to him for disposal, would such an arrangement, followed by the disappearance of the jewelry which occurred in this case, if assumed to be a theft, make defendant guilty of the offense as an accomplice or accessory either before or after the fact?

(2) Assuming that the circumstantial proof was not sufficient for submission to the jury of the hypothesis of defendant's guilt of personal theft, is the theory set out in (1) a sufficiently probable hypothesis from the facts proven so as to have warranted submission of the issue of defendant's guilt to the jury?

(3) Is the foregoing a sufficient basis to sustain a conviction where the indictment charged theft but did not charge defendant as an accomplice or accessory, and where the trial court did not submit to the jury the theory of defendant's guilt as an accomplice or accessory?

The evidence against defendant was entirely circumstantial. The exacting standard that the State must meet in such a case was laid down by the Supreme Court, speaking through Justice Wachenfeld, in *State* v. *Donohue*, 2 N. J. 381, 390, 391 (1949), where it was said:

> "* * * In order to justify a conviction on such evidence, all of the circumstances not only must concur to indicate a defendant's guilt but they must also be inconsistent with any other rational conclusion. It is not enough that they coincide to render probable the hypothesis advanced by the prosecution; they must also exclude beyond a reasonable doubt every *other hypothesis* except that of guilt * * *. Where the essential facts are proved, and where they cannot be rationally explained on any theory other than that the defendant is guilty of the crime charged, such circumstantial evidence will be considered as convincing as evidence of a direct and positive character."

And see *State* v. *Rogers*, 19 N. J. 218, 232 (1955); *State* v. *Rhams*, 14 N. J. 282, 285 (1954); *State* v. *Pincus*, 41 N. J. Super. 454, 459 (App. Div. 1956); *State* v. *Vitale*, 35 N. J. Super. 568, 571-572 (App. Div. 1955); *State* v. *Williams*, 16 N. J. Super. 372, 383 (App. Div. 1951); *State* v. *Fox*, 12 N. J. Super. 132 (App. Div. 1951). In *State* v. *Bulna*, 46 N. J. Super. 313, 317 (App. Div. 1957), affirmed N. J. 1958), without further discussion of this point, we said that "where the proofs of the State are circumstantial, and, at the end of its case, 'reasonably and fairly' make for a hypothesis of innocence, there should be an acquittal notwithstanding that an inference of guilt is also possible," at the same time pointing out that the much stronger criterion found in cases like *Donohue*, *Rhams* and *Fox* was a doctrine widely held.

Viewing the evidence adduced by the State in its most favorable light, it was proved that the jewelry was stolen on Monday, July 30, 1956 between 11 A. M. and 4:30 P. M. (the disappearance of property from the place where the owner put it, without the owner's knowledge or consent, is evidence of theft, 32 *Am. Jur., Larceny*, § 136, p. 1047, and note 8 (1941)); on the day of the alleged theft defendant had taken orders in Newark and East Orange which, it may judicially be noticed, are some miles removed from Goldman's Hotel in West Orange; the charm bracelet was pawned that same afternoon in New York City (which also may be noted as being well over a dozen miles away by the most direct route), and the handwriting expert testified that defendant had signed the pawn ticket; the day following the theft defendant was found in possession of the platinum diamond ring in Poughkeepsie, New York; and defendant apparently had been seen in Goldman's Hotel within several weeks prior to the time of the theft.

We recognize that defendant's recent possession of the Grossbardt jewelry was a circumstance to be considered by the jury, and in connection with other evidence could raise an inference or rebuttable presumption of his guilt of their theft. *State* v. *Lax*, 71 N. J. L. 386 (Sup. Ct. 1904); 1 *Wharton's Criminal Evidence* (12th ed. 1955), § 135, p. 254; 9 *Wigmore on Evidence* (3rd ed. 1940 and 1957 Supp.), § 2513, p. 417; 32 *Am. Jur., Larceny*, §§ 140-143, pp. 1052 et seq. (1940); 52 *C. J. S., Larceny*, §§ 105-110, pp. 924 et seq. (1947). This rule must, however, be applied within the context of the principle set out in the *Bulna, Rogers, Donohue* and other cases cited above, which protects a defendant who is subject to conviction on circumstantial evidence alone. We have here, under the rule of recent possession just stated, a situation where the facts proved are consistent with an hypothesis of defendant's guilt of the crime charged. But the test of the *Bulna* line of cases is

two-pronged: the evidence must also exclude the possibility of reasonably and fairly arriving at a conclusion of innocence. For the reasons about to be stated we have concluded that the proofs in the instant case, purely circumstantial as they were, did not exclude a reasonable hypothesis of innocence of the theft charged, so that the trial court should have granted defendant's motions for acquittal.

Although there are several possible explanations of defendant's possession of the missing Grossbardt jewelry that are consistent with his innocence of its theft, the one that instantly comes to mind, and the most probable, is that the person who actually got possession of the jewelry by larceny or otherwise delivered the items to defendant for disposal. If this was the case, defendant would be guilty of receiving stolen property, N. J. S. 2A:139-1, and not of its theft. We note in this connection that the statute provides that mere possession of property within one year from the date that it was obtained by theft, robbery, or otherwise unlawfully or fraudulently, "shall be deemed sufficient evidence to authorize conviction," unless the accused show to the satisfaction of the jury that it was a gift not received from a minor under 16, or that he paid a fair and reasonable value for it and that it was not received from a minor under 16, or that he bought it from one in a regular and established business for dealing in such property, or that he reported the transaction to the local police at the time of such receiving or buying, or that where the property was obtained from a minor under 16, he communicated with the police and obtained their approval. Thus, N. J. S. 2A:139-1 itself raises a strong but rebuttable presumption of guilt of receiving stolen goods, a significant consideration in a circumstantial case like this where defendant was charged with larceny.

A receiver of stolen goods is guilty of a distinct, substantive offense. He is not an accessory to the theft, nor to

a prior receiving or possessing of the stolen property. The thief and the receiver are not accomplices. *State* v. *Vanderhave*, 47 N. J. Super. 483, 486 (App. Div. 1957); *State* v. *Fox*, 12 N. J. Super. 132, 138 (App. Div. 1951); *State* v. *Gaddis*, 131 N. J. L. 44, 46 (Sup. Ct. 1943); *State* v. *Ruchman*, 68 N. J. L. 120, 122 (Sup. Ct. 1902); *State* v. *Calvin*, 22 N. J. L. 207, 209 (Sup. Ct. 1849). We perceive, of course, the seeming paradox of holding defendant innocent of the criminal charge of theft because it would be entirely reasonable and fair to conclude that he is guilty of another crime—receiving stolen property. Our duty, however, is to decide the issue of defendant's guilt or innocence of the crime with which he has been charged in the indictment, larceny. We cannot usurp the functions constitutionally allocated to our law enforcement officials and the grand jury. 1947 *Const., Art.* I, *par.* 8. We are bound by the decisions which for more than a century have held theft and the receiving of stolen property to be entirely separate and distinct offenses. Since an indictment for larceny will not support a conviction for receiving stolen property, the probability of defendant's guilt of the latter and innocence of the former calls for reversal in the factual setting here present.

We are not concerned here, as the dissenting opinion suggests, with any rule for admeasuring the sufficiency of circumstantial evidence to sustain a conviction for larc[illegible] The question, plainly and simply, is whether the *Donohue* principle, quoted above, is to be put to one side on a suspicion (or even a firmly held conviction) that defendant was in some way guilty of infracting the criminal law. We do not sustain convictions merely because of the presence of an aura of criminality. There should be no predilection to send a defendant to jail for larceny, or accessory to larceny, where the proofs leave open the very definite probability that he was a receiver of stolen goods and there-

fore innocent of the crime charged—and this no matter how accurately the rule on circumstantial evidence may have been charged to the jury.

We are constrained to note that the evidence would seem to supply a much greater support for the charge of receiving stolen property than for its theft. There was no direct evidence placing defendant at or immediately near the hotel premises on the day of the alleged theft nor, indeed, was it actually proved that defendant was in the State of New Jersey during the hours when the theft must have been committed. Further, the evidence identifying defendant as having been at the hotel within the two weeks preceeding the disappearance of the jewelry was greatly vitiated by the effort expended in extracting this modicum of proof from the witnesses. We deem it entirely likely, in view of the obvious size and popularity of the hotel, its large staff and the appreciable employee turn-over, especially on weekends, that the one who took the jewelry must have been familiar with the Grossbardt family and the habits of Mrs. Grossbardt with respect to her valuables. That person entered her hotel room when it was empty, and there was no evidence that anything other than the jewelry box was disturbed. Everything points strongly toward this having been an "inside job," and that defendant's role was that of a "fence."

The pawning of the jewelry under an assumed name, the Poughkeepsie charade, the possible presence of defendant at the hotel sometime earlier that summer, his presence in Newark and East Orange at an unspecified hour and in an unspecified conveyance on the day the jewelry disappeared—all mentioned in the dissent—do not destroy the probable explanation of defendant's having been a receiver. Nor does the fact that the bracelet was pawned within some four or five hours after the hotel room was left empty. The facts definitely permit the inference that whoever took Mrs.

Grossbardt's valuables knew that defendant was available, or would readily be available, at a place in New York City (or indeed New Jersey) to receive what he had for disposal. We cannot jump the factual gap, left open by a total absence of proof that this made defendant an accessory to a *theft*.

Our determination above is dispositive of the questions posed by us following the oral argument and discussed in the supplemental brief. There can be no question but that defendant would be an accessory and accomplice, and punishable as a principal, if he had aided, commanded, induced or procured another to steal Mrs. Grossbardt's jewelry. N. J. S. 2A:85-14; *State* v. *Cooper*, 10 N. J. 532, 568 (1952); *State* v. *Seaman*, 10 N. J. Super. 439 (App. Div. 1949), certification denied 6 N. J. 456 (1951). Aside from the fact that the record does not substantiate either directly or by inference an hypothesis that defendant had an arrangement with anyone at the hotel or elsewhere to *steal* jewelry from hotel guests and to dispose of it through him, the reasonable hypothesis of guilt as a receiver, discussed above, would exclude his conviction as an accomplice or accessory to the theft. Additionally, the case was tried on the single theory that defendant himself had entered the hotel room and had removed the jewelry, and this is reflected in the court's comment that the verdict should be guilty on both counts or on neither. We note, further, that the jury was not charged on the theory that defendant was an accomplice or accessory. Had there been sufficient proof to submit the case to the jury on the latter theory, assuming there was no problem insofar as receiving stolen property is concerned, the indictment charging him as a principal would, of course, have been sufficient. *State* v. *Ellrich*, 10 N. J. 146, 151 (1952); *State* v. *Kuznitz*, 36 N. J. Super. 521, 530-531 (App. Div. 1955); *State* v. *Seaman*, above, 10 N. J. Super., at pages 444-445; *State* v. *Wilson*, 80 N. J. L. 467

(E. & A. 1910), affirming 79 N. J. L. 241 (Sup. Ct. 1910); 4 *Wharton's Criminal Law and Procedure*, §§ 1789, 1791, pp. 610, 613 (1957). The fact remains, however, that the State's evidence reasonably and fairly made tenable the hypothesis that defendant was a receiver, and therefore innocent of the crime charged, whether as principal or accessory to the larceny.

In view of our disposition of the case, it is unnecessary to discuss the other grounds of error raised by defendant. Reversed.

Dissenting Opinion.

CONFORD, *J. A. D.*, Dissenting:

I am constrained to dissent, with deference, from the conclusion of the majority for reversal and acquittal. I am persuaded that the evidence here justifies affirmance of the conviction.

If the jury credited the testimony of the handwriting expert which tended to establish that the defendant had pawned one of the stolen pieces of jewelry in New York City the day of the theft, it was entitled to find that the defendant was in possession of some of the stolen articles within hours or minutes after they were taken. Moreover, he was undeniably shown to be in possession of one of the articles the next day in Poughkeepsie, New York.

The overwhelming weight of authority is that the recent possession after larceny of stolen goods warrants the inference that the possessor was the thief, or, at least, that coupled with other inculpatory evidence, a jury verdict of guilt based thereon will be sustained. 52 *C. J. S.*, Larceny, §§ 105-110, pp. 923, 935, and the other authorities for these propositions cited in the majority opinion. Literally

scores of cases are cited for these rules in these words. In *State* v. *Lax*, 71 N. J. L. 386, 387 (Sup. Ct. 1904), the court approved the rule that the possession by the defendant of stolen goods "at a time not too long after the stealing is a circumstance for the jury to consider and weigh in connection with the other evidence on the issue of guilt of theft." In *State* v. *Dunlap*, 103 N. J. L. 209 (Sup. Ct. 1927), the court sustained a conviction of larceny based largely upon the circumstantial evidence of possession of the stolen goods shortly after their theft where it might also have been argued, as does the majority here, that the evidence pointed also to the hypothesis of guilt of receiving; and see *State* v. *Janiec*, 20 N. J. Super. 471, 481 (App. Div. 1952).

It has been held in those jurisdictions where possession alone is not sufficient that slight inculpatory evidence additional to that of recent possession of stolen goods will suffice to sustain a conviction. Examples thereof are the giving of false explanations of possession, *People* v. *Crotty*, 70 Cal. App. 515, 233 Pac. 395 (Dist. Ct. App. 1925); *People* v. *Farrell*, 67 Cal. App. 128, 227 Pac. 210 (Dist. Ct. App. 1924), or selling the property under an assumed name, *People* v. *Lang*, 142 Cal. 482, 76 Pac. 232 (Sup. Ct. 1904), or other conduct with respect to the goods betraying or evidencing "a guilty mind." *State* v. *Kinghorn*, 109 Mont. 22, 93 P. 2d 964 (Sup. Ct. 1939); and see *McCutcheon* v. *State*, 140 Tex. Cr. 74, 143 S. W. 2d 611 (Cr. App. 1940) (selling property under an assumed name); and see *State* v. *Janiec*, *supra* (20 N. J. Super. at p. 481). In the present case there was the pawning of some of the jewelry under an assumed name, the fantastic explanation to the Poughkeepsie jeweler of having found one of the pieces in the street, the evidence of defendant having been seen on the hotel premises during the summer, and the proof of his presence in Newark and East Orange on the day of the theft. Most

damaging is the proximity in time between the period when the jewelry was stolen and the hour the same day when defendant was pawning one of the articles in New York City. The shorter the period of time between theft and possession by the defendant the stronger the justification for the inference of theft. 52 *C. J. S., Larceny*, § 109, p. 934, n. 47.

The majority assert that the rule of inference of guilt from recent possession must be applied "within the context of the principle" set out in the *Bulna*, *Rogers* and *Donohue* cases cited in their opinion concerning the sufficiency of circumstantial evidence. I would suggest, rather, that when the accumulation of judicial experience in the review of convictions of a particular type of crime distills a specific rule, widely applied, for admeasuring the sufficiency of circumstantial evidence to sustain a conviction of such a crime, the general rules of sufficiency of evidence should be applied with deference to the special applicability of the particular rule. And so here.

But even were we here to apply literally the *Bulna* rule requiring an acquittal on appeal if the proofs "reasonably and fairly make for a hypothesis of innocence" of the crime charged, I cannot agree with the conclusion of the majority that such a determination is called for in this case because of the asserted predicate that the most probable explanation of defendant's possession of the jewelry if it was stolen is that he received it from the thief without being himself implicated in the theft; and that where the circumstantial proofs point to a crime other than that charged there must be an acquittal. As already noted, the defendant was in possession of at least one of the articles the same day and within less than four hours after they were taken. In my judgment there is a much stronger basis for belief that, if he did not personally steal the jewelry, he was in complicity with another who did, which would justify his conviction as a principal on the hypothesis that he was an

accessory in the crime. N. J. S. 2A:85-14; *State* v. *Western Union Telegraph Co.*, 12 N. J. 468, 495 (1953). The mere fact that the evidence would justify an inference of receiving cannot derogate from the effect of the proofs in permitting the stronger inference of stealing, directly or indirectly. Cf. *State* v. *Giordano*, 121 N. J. L. 469, 472 (Sup. Ct. 1939). The majority opinion, while accepting the hypothesis of receiving, rejects the tenability of the hypothesis of theft on the basis that there is a "total absence of proof" thereof. But it is obvious that there is no more direct proof for one theory than the other. There is a circumstantial foundation for either.

I fear that in their quotation from *State* v. *Donahue*, 2 N. J. 381, 390, 391 (1955), the rule requiring the State in a circumstantial evidence situation to "exclude beyond a reasonable doubt every other hypothesis except that of guilt," and using it as a guide for appellate action, the majority have lost sight of our *caveat* in *State* v. *Bulna*, 46 N. J. Super. 313, 317, 318 (App. Div. 1957), that this is a rule to be charged the jury, not a rule by which a trial or appellate court may properly undertake itself to admeasure the proofs and thereby determine whether the defendant should be or should have been acquitted. *State* v. *Boyd*, 137 N. J. L. 23, 26 (Sup. Ct. 1948), affirmed 137 N. J. L. 615 (E. & A. 1948). The correct rule is explicitly stated by Judge Clapp in *State* v. *O'Shea*, 28 N. J. Super. 374, 378 (1953), affirmed 16 N. J. 1 (1954), by Mr. Justice Case in the *Boyd* case, *supra*, and by Judge Daniel J. Brennan in an opinion adopted by the Supreme Court in *State* v. *Rhams*, 14 N. J. 282, 285 (1954). I am persuaded that the conversion of the rule from one to be charged for the guidance of the jury to one for the admeasurement of the proofs for sufficiency on a motion for acquittal, or by an appellate court on review of a conviction, see *State* v. *Fox*, 12 N. J. Super. 132, 137 (App. Div. 1951), is not a sound

conception and operates to put the judge in the jury box, as well as to place an intolerable handicap on the State in criminal cases based upon circumstantial evidence. It is functionally as wrong as it would be to say that in a civil case a judge should direct a verdict for the defendant if *he himself* finds from his own examination of the evidence that the plaintiff did not sustain his burden by a preponderance of the credible proofs. I do not believe that the holdings or the opinions in *State* v. *Donahue, supra;* and *State* v. *Rogers,* 19 N. J. 218, 232 (1955), are contrary to the views herein expressed.

The rule under discussion was appropriately and correctly charged to the jury in the present case, substantially in the language of the *Donahue* and *Boyd* cases, and in the context of the pervading principle that the defendant must be found to be guilty beyond a reasonable doubt. This done, the requirements of the cases were satisfied. So long as we are satisfied that there was a basis for the inference of guilt, and that reasonable minds might differ as to whether it should be drawn consistently with the requirements of finding proof beyond a reasonable doubt and the special rule of excluding every hypothesis except that of guilt, the function of drawing or rejecting the inference was exclusively for the jury.

I find no basis for reversal in any of the other assertions of trial error by the defendant and I would therefore affirm.

APPENDIX C.

Mandate on Reversal.

SUPREME COURT OF NEW JERSEY

This cause having been duly argued before this Court by Mr. V. Seeley Romaine, counsel for the appellant and Mr. Samuel Allcorn, Jr., counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court—Appellate Division is in all things reversed, set aside and for nothing holden, with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record and proceedings be remitted to the said Superior Court—Appellate Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable JOSEPH WEINTRAUB, Chief Justice, at Trenton on the second day of February, 1959.

FILED
Feb 2 1959
John H. Gildea
Clerk

.....
Clerk of the Supreme Court

APPENDIX D.

Indictment.

ESSEX COUNTY, to wit:

The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that Marvin Dancyger, on the 30th day of July, 1956, at the Town of West Orange, in the County of Essex and within the jurisdiction of this Court, did wilfully enter the room of Estelle Grossbardt, with intent to steal, contrary to the provisions of N. J. S. 2A:94-1, against the peace of this State, the government and dignity of the same.

SECOND COUNT.

And the Grand Jurors aforesaid, upon their oath do further present that Marvin Dancyger, on the date, place and in the jurisdiction set forth in the first count herein, did steal, take and carry away 1 platinum diamond ring of the value of $2,750.00, the property of Estelle Grossbardt, contrary to the provisions of N. J. S. 2A:119-2, against the peace of this State, the government and dignity of the same.

THIRD COUNT.

And the Grand Jurors aforesaid, upon their oath do further present that Marvin Dancyger, on the date, place and in the jurisdiction set forth in the first count herein, did steal, take and carry away 1 ring of the value of $500.00, the property of Estelle Grossbardt, contrary to the provisions of N. J. S. 2A:119-2, against the peace of this State, the government and dignity of the same.

(s) CHARLES V. WEBB, JR.,
County Prosecutor.

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JAMES R. BROWNING, Cl

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 886

MARVIN DANCYGER,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

BRIEF FOR RESPONDENT IN OPPOSITION

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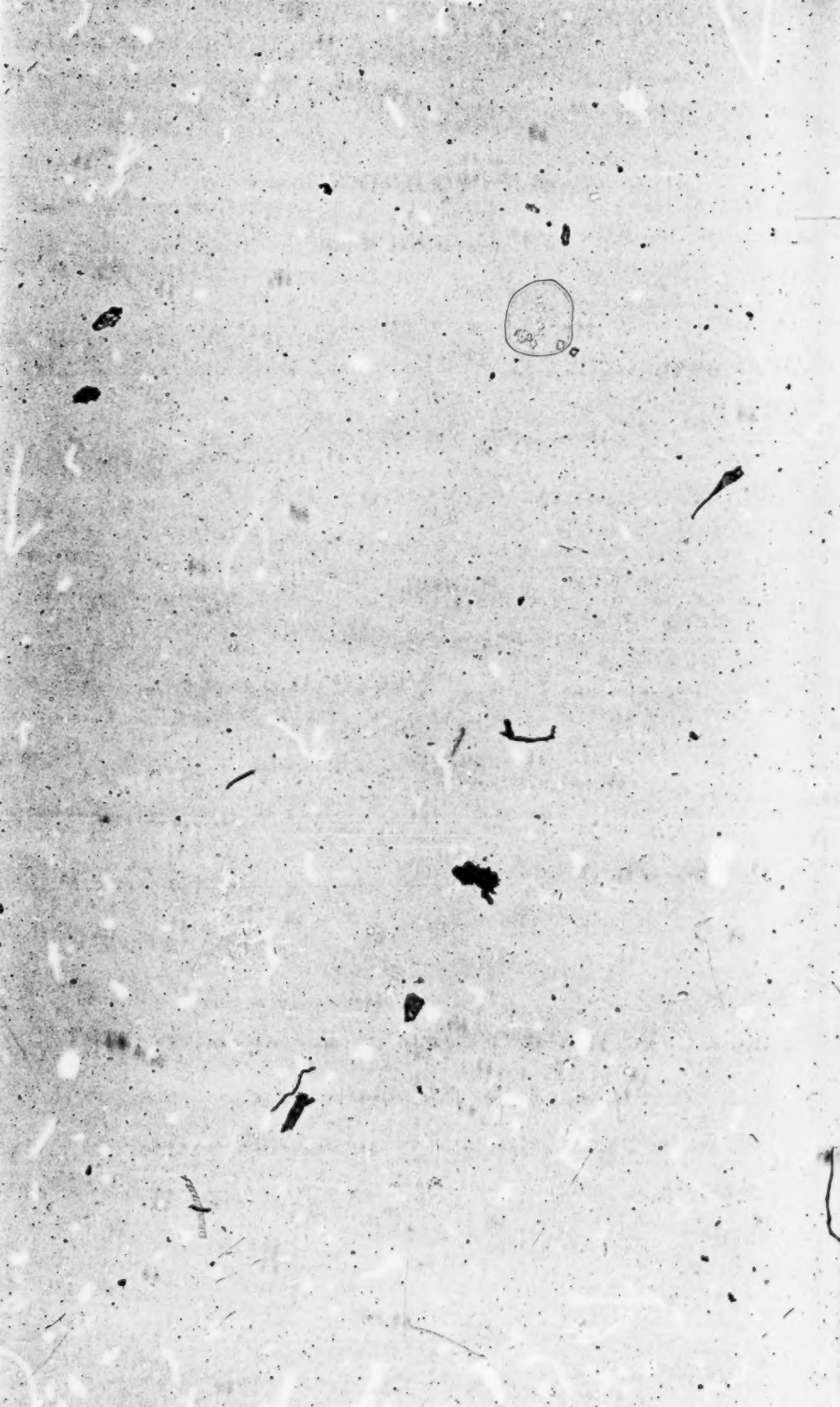

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Opinions Below

The opinion of the Supreme Court of New Jersey, the Court immediately below, reversing the judgment of the Superior Court of New Jersey, Appellate Division, is officially reported in 29 N. J. 76, 148 A. 2d 155 (Appendix A of Petition.

The majority opinion of the latter Court, and the dissenting opinion, are officially reported in 51 N. J. Super. 150, 143 A. 2d 753 (Appendix B of Petition).

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

1. Whether the trial court could properly comment upon petitioner's failure to take the stand at the trial and deny certain facts which circumstantially implicated him, and whether the charge, which was in strict conformity with New Jersey law, was such as to deny him his privileges and immunities and due process of law.[1]

2. Whether the prosecutor's summation on the same subject constituted a denial of petitioner's privileges and immunities and due process of law.[1]

Statement[2]

At the trial, the complaining witness, Mrs. Estelle Grossbardt, testified for the State that she spent the 1956 summer vacation period as a guest at Goldman's Hotel, in West Orange, New Jersey (P8a-11 to 15; P14a-9 to 10). She was accompanied there by her two children, aged 10 and 2, and by a "governess" (P8a-23 to 24; P17a-9 to 12). Her husband joined his family on weekends at the hotel.

During her attendance at the hotel, Mrs. Grossbardt, her children, and her husband all occupied the same room (P8a-23 to 24), while the "governess" occupied a separate room (P17a-11 to 14). Mrs. Grossbardt's room was located on the main or ground floor of the hotel (P34a-27 to 29). Access to the room was off a central corridor, which

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[1] Constitution of the United States, Amendment XIV, Section 1.

[2] References are to the printed Appendix of Respondent in the New Jersey Supreme Court.

in one direction led to the main lobby at the front of the hotel and in the other direction led to a side entrance door (just three doors beyond Mrs. Grossbardt's room) into the parking lot and ultimately to a rear entrance door into the swimming pool area (P34a-30 to 40).

Mrs. Grossbardt brought with her to the hotel some of her personal jewelry, consisting of the platinum diamond wedding ring, here involved, a charm bracelet, "cultured pearls, a wrist watch, a cultured pearl wedding band, and a pinkie ring, cultured pearl and diamonds" (P8a-38 to P9a-20). The platinum diamond ring, which cost $2,700 (P96a-38), and the charm bracelet were purchased by the Grossbardts from a firm of jewelers, one of the partners of which was the brother of Mrs. Grossbardt's husband (P96a to P98a-29).

Mrs. Grossbardt did not lock the door to her room except during the night while she was sleeping. She kept her jewelry in a jewel box on top of the dresser in her room (P9a-21 to 22; P14a-5 to 7; P18a-12 to 30). The room was kept unlocked so that the 10 year old child and the "governess" for the two year old child could have access during the day and so that the children would not be locked in while asleep at night (P17a-5 to 6; P18a-12 to 30).

Mrs. Grossbardt testified that, on Sunday evening, July 29, 1956, she wore a portion of her jewelry, including the platinum diamond ring and the charm bracelet (P9a-27 to 40). When she returned to her room in the early hours of Monday, July 30, she placed all the jewelry that she had been wearing in the jewel box on her dresser (P10a-23 to 30). She further testified that, after placing the jewelry in the jewel box, she had no further occasion to go to the box until 7 p.m. on Tuesday, July 31 (P10a-30 to 40). At that time, while dressing for dinner, she dis-

covered that her platinum diamond ring, her charm bracelet and other items of her jewelry were not in the box (P11a-5 to 20).

Mrs. Grossbardt thereupon notified the proprietors of the hotel of the disappearance of the missing jewelry, and they in turn notified the West Orange police (P11a-21 to 25; P35a-15 to 16). The local police made an investigation the same evening and, subsequently sent out teletype containing a description of the missing jewelry (P75a to P76a-7 to 12).

There was proof that the charm bracelet was pawned at a pawnshop at 1937 Broadway, New York City, on July 30, 1956, at a time estimated to be between 3:30 and 4:30 p.m. (P65a-14 to 21; P82a-29 to 32; P95a-10 to 24). Mrs. Grossbardt testified that her room was not left unoccupied until 11 a.m. or later on the morning of July 30 (P14a-29 to 40). In view of this testimony, the jewelry must have disappeared sometime after 11 a.m. and sometime before 3:30 p.m. on Monday, July 30, 1956.

The State produced evidence that, from November, 1955, right up to the time of the trial, the defendant was employed as a salesman by Charles S. Loeb Company, of New York City which company is engaged in the importing and wholesaling of pipes and smokers articles (P19a-30 to 40). The duties of the defendant were those common to any outside salesman—to call on customers and prospective customers (in this case, retailers of pipes and smoker's articles) to exhibit samples of his merchandise and to take orders and occasionally to make collections for his employer (P20a-12 to 25; P23a-20 to 21). Where a call was successful, a written order was prepared on a company order form listing the customer's name and address and the merchandise ordered, the original of which was given to the employer (P20a-30 to 40). The defend-

ant's employer did not require or keep a record of calls made by its salesmen that did not result in the placing of an order (P24a-25 to 34).

Further evidence was adduced showing that the defendant, in the course of his employment, on July 30, 1956, took orders from four different customers located in Newark and East Orange, New Jersey (Exhs. S-3, S-4, S-5 and S-6, P161a, P163a, P165a, P167a).

The State also called two witnesses, Morris White and Rae White, his wife, the proprietors of a jewelry store located at 257 Main Street, Poughkeepsie, New York. They testified that, on July 31, 1956, between noon and 1 p.m., the defendant entered their store and showed the platinum diamond ring to Mrs. White (P51a-5 to 12). He told her that he had found the ring in the street, and asked whether the ring was "glass or is it a diamond" (P51a-12 to 24). Mrs. White took the ring to her husband, who was working in a room at the rear of the store, and he, professing suspicion, instructed Mrs. White to call the local police (P54a-6 to 20).

When the police arrived at the jewelry store, they requested the defendant to accompany them "to police headquarters to be questioned" (P57a-36 to 37). The defendant accompanied the police officers to police headquarters where, in response to their questioning, he informed them that he was employed as a salesman by Charles Loeb Company and had been making calls on his customers in Poughkeepsie that morning (P58a to P59a-37). The defendant further stated that after completing a call on a customer at Main News Company, 275 Main Street (P59a-8 to 11), he crossed the street, and noticed a "shining object in the gutter" (P59a-11 to 12). After picking it up, the defendant saw the White's Jewelry store and took the ring there to determine whether or not it was of any value (P59a-12 to 15).

On August 4, the Poughkeepsie police sent out a teletype message to the West Orange police, containing a description of the ring (P59a-27 to 39). Three weeks later, on August 25, two West Orange police officers accompanied by Mrs. Grossbardt, appeared at Poughkeepsie police headquarters, at which time Mrs. Grossbardt identified the ring as belonging to her (P60a-9 to 22).

Mr. Maclyn Goldman, a member of the bar of New Jersey and one of the proprietors of Goldman's Hotel, was called as a witness by the State, as was Mr. Herbert Fine, a physical education teacher at a Brooklyn high school, who was employed at Goldman's in the summer of 1956. Mr. Goldman, when asked whether he had ever before seen the defendant, replied that he had identified a police photograph of the defendant sometime after the disappearance of the jewelry. Upon being shown the police "mug" photograph of the defendant (Exh. S-7), Mr. Goldman identified it as being a photograph of a person that he had seen a "week or two" prior to July 30, 1956, and on several occasions previous thereto, as a dinner guest at the hotel (P36a-34 to 40; P37a-10 to 12; P42a-7 to 35).

Mr. Fine testified that he had seen the defendant at the hotel "during the summer of '56," on a Saturday night between July 15 and July 30, 1956 (P86a to P88a-34 to 35)—i.e., prior to the disappearance of the jewelry on Monday, July 30.

The final witness called by the State was a handwriting expert. He testified that he had compared the handwriting on the pawn ticket with samples of the handwriting of the defendant and that they were all written by one and the same person (P103a-7 to 8).

Following the conclusion of the State's case, the defendant's wife was called as a witness on behalf of the defend-

ant. Her testimony was that, during the summer months of 1956, and particularly June and July of 1956, the defendant invariably spent Saturday evenings with her and their children (P134a to P135a-8 to 17).

The defendant himself did not take the stand.

At the conclusion of the entire case, the jury retired and deliberated for nearly four hours. The jury found the defendant guilty of the larceny count and reported that it had been unable to reach agreement on the count charging entering with intent to steal (P159a-36 to 38). The court thereupon declared a mistrial as to the latter count (P160a-13 to 15).

On December 5, 1957, petitioner moved for a new trial, and the motion was denied on January 15, 1958 (P3a to P4a).

On January 20, 1958, petitioner was sentenced to a term of 3 to 5 years in New Jersey State Prison (P2a).

On appeal to the Appellate Division of the New Jersey Superior Court, the judgment of conviction was reversed, with a dissenting opinion (Petitioner's Appendix B, pp. 30-42; pp. 42-46).

By virtue of Revised Rule 1:2-1(b) of the New Jersey Supreme Court whereby an appeal from the Appellate Division may be taken "In causes where there is a dissent in the Appellate Division of the Superior Court," the State took an appeal to the Supreme Court of New Jersey, and the latter court reversed the judgment of the Appellate Division (Petitioner's Appendix A).

On March 17, 1959, petitioner made application to this Court for a stay of execution of the judgment of conviction and sentence; on March 18, 1959; the respondent herein filed an opposition to said application; the papers were

presented to Mr. Justice BRENNAN and on the same day, March 18, 1959, petitioner's application for a stay of execution was denied by Mr. Justice BRENNAN.

On March 19, 1959, petitioner made application to the New Jersey Supreme Court for a stay of execution pending disposition of a petition to this Court for a writ of certiorari, and his application was denied.

On April 23, 1959, petitioner made application to the New Jersey Supreme Court for recall of its mandate and for a rehearing of the appeal before that court, and on April 27, 1959, the New Jersey Supreme Court denied his petition.

On April 30, 1959, this office was served with copies of the petition filed with this Court for issuance of a writ of certiorari.

ARGUMENT

The State's evidence at the trial warranted the court's comment on defendant's failure to testify; the charge as given was correct and in the language repeatedly approved by New Jersey; and defendant was not denied any constitutional rights and privileges.

At the trial, the State's evidence established certain inculpatory facts which were within defendant's personal knowledge and which he could have disproved by his own oath as a witness if the facts were not true.

But defendant chose not to take the stand in his own behalf.

For example, there was the testimony of the owner of Goldman's Hotel (Mr. Maclyn Goldman) that the defendant was present at the hotel prior to the date of the alleged theft.

There also was the testimony of the hotel's social director (Mr. Herbert Fine) that he had seen the defendant in the hotel lobby sometime after 8:00 P.M. on a Saturday evening between July 15 and July 30, 1956, prior to the date of the alleged theft.

Then there was the unimpeached testimony of the handwriting expert (Mr. J. Howard Haring) establishing the fact that defendant, under an assumed name, had pawned the charm bracelet which was part of the stolen jewelry, thereby establishing the fact that defendant was in possession of the stolen jewelry within a few hours after its disappearance.

All of these facts were inculpatory; they were within the personal knowledge of defendant; and he could have disproved them by his own oath as a witness if they were not true.

Following is the portion of the court's charge under attack (P156a-35):

> "The defendant did not take the stand himself. Well, in that connection, I will charge you as follows: The defendant is at all times presumed to be innocent and the burden of proving his innocence is not upon him. He is not required to show he is innocent, and I charge you that it is the privilege of the defendant to testify or not, as he chooses. You are not at liberty to infer guilt from his failure to give evidence. However, where facts concerning the acts of the defendant are testified to which tend to prove his guilt and he by his oath can deny them, his failure to testify in his own behalf raises a strong presumption that he cannot truthfully deny those facts.
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> The criterion is whether there are facts in evidence concerning the acts or conduct of the defendant, with-

in his personal knowledge, which are inculpative or imputative in some degree of guilt, which fact he, by his oath, can deny."

Petitioner's contention in the New Jersey Supreme Court was that the case was not one which called for any comment at all on defendant's failure to take the stand; that if given, it should have been limited to "inculpatory" facts; and that the trial judge should have explained that the presumption of defendant's inability to deny the proven facts, instead of being a "strong presumption", was one that was "permissive only."

The State contended that the proven facts concerned the acts of defendant; that they were inculpatory and tended to prove defendant's guilt; that they were within the defendant's personal knowledge and he could have denied them under oath; and that his failure to testify gave rise to a strong presumption that defendant could not truthfully deny those facts.

We submit that the case presented the situation where a charge by the court upon defendant's failure to testify was fully warranted in accordance with New Jersey law.

And the trial court gave a charge which has been repeatedly approved by the New Jersey rule. (See *State* v. *Costa*, 11 N. J. 239, 94 A. 2d 302; *State* v. *Corby*, 28 N. J. 106, 145 A. 2d 289.)

The New Jersey Supreme Court upheld the charge, stating that the charge was warranted and that it was in conformity with the law of our State.

In his petition, petitioner also urges that the prosecutor, in his summation, should not have been permitted to make comment upon the defendant's failure to testify, stating (P10a), "This is not the case where within possible limita-

tions the court and prosecutor can comment on a defendant's criminal action refusal to testify."

In his petition, petitioner sets up the portion of the record (P6a bot. to P8a), wherein the prosecutor made brief comment upon the defendant's failure to take the stand. When the prosecutor attempted to point out some particular testimony of a State witness, he was interrupted by defense counsel and there followed some discussion between court and defense counsel on the pertinent rule, during the course of which defense counsel readily conceded (P7a), "I am fully aware of the law of the State of New Jersey, the fact that the prosecutor can comment," and (P8a), "I think that is a matter for the Court to instruct the jury."

At the conclusion of the discussion, the court advised defense counsel (P8a):

> "The Court: Well, of course I shall instruct the jury and I shall tell the jury that they are bound to take the law from the judge, not from counsel. But I think it is proper for counsel to state his understanding of the law as a preface to his argument."

We cannot perceive how the brief remarks of the prosecutor could possibly have harmed and prejudiced the defendant to the extent that his constitutional rights and privileges were violated, especially in view of the court's charge that the jury was duty-bound to accept the law from the judge and not counsel.

It is to be noted, too, that petitioner did not question, in the New Jersey Supreme Court, the propriety of the prosecutor's comments on defendant's failure to testify, his only attack being directed against the propriety and validity of the court's charge on the subject.

New Jersey is one of the few states which permit a trial court to make comment on a defendant's failure to deny inculpatory facts tending to establish his guilt. (*Wharton's Criminal Evidence*, 12th Ed., sec. 147; 8 *Wigmore, Evidence*, 3d Ed., sec. 2272.)

As the New Jersey Supreme Court aptly stated in *State* v. *Corby, supra*, p. 113 of 28 N. J.:

> "* * * the rule accords with common sense and justice. A defendant cannot be compelled to testify, but the privilege of doing so was created for the benefit and protection of the innocent. If he remains silent when he should speak, he does so by choice and that choice should reasonably be subject to comment; his failure is logically relevant as to his guilt or innocence." (Citing the concurring opinion of Mr. Justice FRANKFURTER in *Adamson* v. *California*, at 332 U. S. 61, 67 S. Ct. 1679, 91 L. Ed. 1912.)

The case of *Adamson* v. *California*, 332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903, cited and quoted from by petitioner (P10a to P12a), would seem to support the respondent's contention.

There, the defendant who was convicted of 1 t-degree murder, questioned the validity of a California statute which permitted comment on defendant's failure to testify as repugnant to due process because, as he claimed, by testifying he would be subjecting himself to cross examination and thereby having his testimony impeached because of his previous criminal record. In rejecting the defendant's contention this Court stated, significantly (p. 1678 of 67 S. Ct.):

> "* * * California has prescribed a method for advising the jury in the search for truth. However sound may be the legislative conclusion that an ac-

cused should not be compelled in a criminal case to be a witness against himself, we see no reason why comment should not be made upon his silence. It seems quite natural that when a defendant has opportunity to deny or explain facts and determines not to do so, the prosecution should bring out the strength of the evidence by commenting upon defendant's failure to explain or deny it. The prosecution evidence may be of facts that may be beyond the knowledge of the accused. If so, his failure to testify would have little if any weight. But the facts may be such as are necessarily in the knowledge of the accused. In that case a failure to explain would point to an inability to explain."

The case of *Slochower* v. *Board of Higher Education of the City of New York*, 350 U. S. 551, 76 S. Ct. 637, 100 L. Ed. 692, cited and quoted from (P11a to P12a), cannot be made to apply here.

That was a case in which a college professor who had invoked the privilege against self-incrimination before a Senate investigating committee was subsequently discharged by the city from his school employment, and he attacked the constitutionality of the city charter under which his discharge was effected.

This Court held that, merely because the city employee relied upon the Fifth Amendment plea of self-incrimination to avoid answering questions before the investigating committee and his summary dismissal in the circumstances of the case constituted a violation of due process.

In that case, Slochower took the stand before the investigating committee and refused to answer a question whether he had been a Communist affiliations before 1941 and he stood upon his constitutional right against self-incrimination under the Fifth Amendment by refusing to answer the question.

Here, on the other hand, the petitioner stood accused of the crime of grand larceny, and at the trial the prosecution established inculpatory facts against him which were in his personal knowledge and which he could have denied under oath, and by his abstention from testifying the prosecutor and trial judge were amply justified in commenting upon his failure to testify, in accordance with New Jersey law; and the charge as given was in accord with the established rule of New Jersey.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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